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No. 03-718

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

CHARLES DESMOND TUCKER,

Petitioner,

v.

FRANK EDWARD FEARN and JUDY FEARN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

1. Whether the District Court correctly followed precedent in ruling that non-dependent parents of a non-seafarer killed within Alabama territorial waters may not recover non-pecuniary damages under general admiralty law.

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents Frank Edward Fearn and Judy Fearn (collectively "Fearn") submit that the Petition for Writ of Certiorari ("Pet.") filed by Petitioners is due to be denied.

STATEMENT OF THE CASE

This is a wrongful death action arising out of a boating collision between a 19' Wellcraft power boat and a 36' Pearson sailboat on the intra-coastal waterway near Orange Beach, Baldwin County, Alabama. At the time of the collision, the Wellcraft was occupied by two minors, J.R. Rinaudo and Charles Justin Tucker (Petitioners/ Plaintiffs' decedent herein)

At approximately 7:00 p.m. on the evening of October 23, 1998, Frank Fearn and his wife Judy were traveling eastward on the intra-coastal waterway under power utilizing the Pearson's inboard diesel engine. Mr. Fearn's position was to the southside of the intra-coastal waterway or, on a course starboard to the centerline of the intra-coastal waterway.

The accident occurred on a bend in the intra-coastal waterway. An independent witness, John Kennedy, testified that he was proceeding west in his car on the Canal Road which runs parallel to that portion of the intra-coastal waterway near where the accident occurred. At that time, he observed the Wellcraft boat as it sped westbound on the intra-coastal waterway, approaching the Fearn's sailboat. According to Mr. Kennedy, it appeared to him that the Wellcraft boat was attempting to "pace" his

speed. Mr. Kennedy estimates that the Wellcraft boat was traveling at approximately 45 mph in darkened conditions.

As the Wellcraft rounded the slight bend in the channel, it crossed the centerline of the intra-coastal waterway, traveled in the south part of the channel and collided with the Fearn's sailboat. Charles Justin Tucker died as a result of the injuries he received in this boating collision.

REASONS FOR DENYING THE WRIT

I. General Maritime law holds that non-pecuniary damages are unavailable to non-dependents of a non-seaman in a wrongful death action where the death occurs in state territorial waters.

The general maritime wrongful death action for a breach of maritime duties was created in *Moragne v. States Maine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed. 2d 339 (1970). As noted by the lower court, *Moragne* never set out the specific remedies available in that case but merely created the available action. Prior to the holding in *Moragne* the dependent of the decedent seaman or longshoreman killed within state territorial waters would have no available action while the same death outside the state territorial waters would have available remedies through the Death on the High Seas Act, U.S.C. Appx. §§761 et seq. (hereinafter "DOSHA") and the Jones Act, 486 U.S.C. Appx. §688. These two statutes were originally created to provide remedies for losses incurred by a decedent's dependents. *Moragne* also relied heavily on those two statutes to support the creation of a wrongful

death action under general maritime law. This wrongful death cause of action under general maritime law was created to continue congressional intent as evidenced in the Jones Acts and DOSHA where all the beneficiaries were dependents of the decedent.

The Petitioner is correct in that *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806, 39 L.Ed. 2d 9 (1974) (hereinafter "*Gaudet*") allowed the dependent widow of a longshoreman to recover damages for loss of support, services and society. What Petitioner does not mention is that the support, services and society were allowed in that case based on the policy that dependents should recover for losses resulting from their dependance on the decedent. *Id.* at 583. The uniformity of *Moragne*, DOSHA and the Jones Acts was violated by the *Gaudet* ruling. This aberration was duly noted in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 112 L.Ed. 2d 275, 111 S. Ct. 317 (1990) (hereinafter referred to as "*Miles*"). As noted by the lower court in the case *sub judice,* the Supreme Court in *Miles* limited *Gaudet* to longshoreman only, thus, restricting the aberration. The Court in *Miles* stated: "the explicit limitation (in DOSHA) precludes recovery for non-pecuniary loss, such as loss of society, in a general maritime action". *Miles* at 290. The Petitioner's reliance upon *Gaudet* is misplaced due to the fact that the case *sub judice* does not involve longshoreman killed in state territorial waters. *Gaudet* is not authoritative on the issue presently before the court. Further, *Miles* has decisively held that it would be inconsistent to allow non-pecuniary recovery in a death of a seaman within state territorial waters where the Jones Act precludes the same recovery outside state territorial waters. *Id.* at 291.

II. Alabama's wrongful death statute requires that general maritime law apply where the death of a non-seafarer occurs within Alabama's territorial waters.

Maritime wrongful death causes of action led eventually to the holding in *Yamaha Motor Corp., et al. v. Calhoun*, 516 U.S. 199, 116 Sup. Ct. 619, 133 L.Ed. 2d 578 (1996) (hereinafter referred to as "*Yamaha*"). *Yamaha* reviewed whether the federal maritime claim for wrongful death recognized originally in *Moragne* constituted the exclusive remedy in cases where a death of a non-seafarer occurred in territorial waters. *Yamaha* held that within territorial waters, where DOSHA or the Jones Act did not apply, state wrongful death statutes would be applicable. *Yamaha* at 213. The damages would therefore be properly governed by state law. *Id.* Logically, if non-pecuniary damages were available under general maritime law, then the plaintiff in *Yamaha* would not have been relegated to requesting the application of state law. There is no recovery for non-dependents of non-pecuniary losses as evidenced by the application of state law in *Yamaha*.

Alabama's wrongful death statute is not available for application in the maritime context because of the holding in *Re: Amtrak "Sunset Limited"* Train Crash, 121 F.3d 1421 (11th Cir. 1997). The court in *Amtrak* held that Alabama's wrongful death statute conflicted with general maritime law in two significant ways: only punitive damages could be awarded and Alabama strictly forbids the application of apportioned fault. *Amtrak* also held that there was no recovery for non-pecuniary damages for non-dependents in a personal injury claim thereby affirming the line of cases holding same.

III. Petitioner's reliance upon *Sutton v. Earles* is misplaced.

Ten percent of the Petitioner's brief is taken up by a quotation from *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994). However, the *Sutton* decision has found disfavor in the Fifth Circuit. The Court's reversal and remand with instructions to reconsider its award of loss of society damages in light of recent U.S. Supreme Court decisions resulted in *Walker v. Braus*, 861 F.Supp. 527, 1995 A.M.C. 1516 (E.D. La. 1994).[1] The Eastern District Court thereby declined to follow *Sutton* and ruled that *Sutton* was inconsistent with the general maritime aim of creating uniformity under admiralty law with respect to the recovery of damages of those injured or killed on navigable waters. The court stated:

> The Court declines to follow *Sutton* because it is inconsistent with the Supreme Court's decision in *Miles* and with the trend within the 5th Circuit towards eliminating loss of society damages under general maritime law. To begin with, *Sutton* creates a non-uniform recovery within the 9th Circuit, precisely what the Supreme Court counseled against in *Miles*. Just one year ago, in *Smith v. Trinidad*, 992 F.2d 996 (9th Cir. 1993), the 9th Circuit held that uniformity requirement in *Miles* compelled that conclusion that the spouse of an injured seaman may not recover loss of society damages under general maritime law. See also *Newhouse v. United States*, 844 F.Supp. 1389, 1393-94 (D.Nevada 1994) (beneficiaries of non-seaman killed in state territorial waters

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[1] See *Walker v. Braus*, 995 F.2d 77 (5th Cir. La. 1993)

> cannot recover non-pecuniary damages such as future economic loss in a survival action because *Miles* "has limited the availability of damages under *Moragne* wrongful death action to those that reflect pecuniary losses) *Sutton* therefore creates an anomaly within the 9th Circuit: the beneficiaries of seaman – traditionally the wards of admiralty – cannot recovery damages that beneficiaries of non-seaman are permitted to recover. The Supreme Court's decision in *Miles* was designed to eliminate these kinds of inconsistent results. *Miles*, 498 U.S. at 30-33, 111 Sup. Ct. at 324-26. Finally, the trend within the 5th Circuit is clearly in the direction of the eliminated loss of society as an element of damages in all maritime cases. Therefore in the interest of uniformity, this court follows that trend and declines to follow *Sutton*.

Id. 861 F.Supp. at 536-37.

Importantly, neither *Yamaha* nor *Amtrak* rely on *Sutton's* rationale. *Sutton* is not even cited in *Amtrak*, where one of the issues was specifically whether non-pecuniary damages were recoverable in personal injury accidents. If *Sutton* was at all favored by the court, mention would have been made of it in *Amtrak*, where wrongful death and personal injuries were both involved.

IV. The two guiding principles of maritime law, special solicitation to seafarers and uniformity, demand the lower court's ruling be affirmed.

The law of remedies that the petitioner relies upon must be subservient to the two guiding principles in maritime actions. Without the principles of the actions

that are created under maritime law, there are no remedies. As such, the two guiding principles of maritime actions must take precedent. The first is that individuals who work upon the dangerous seas are given special solicitude. See *Moragne*, 398 U.S. at 387 (1970). The second is the importance of uniformity in the application of maritime law. These two principles are the reasons for *Moragne's* creation of a general maritime action for wrongful deaths. The seaman who is within territorial waters but not covered by the Jones Act or DOSHA did not have a cause of action prior to *Moragne*. Through the creation of said wrongful death action, uniformity was reinforced. The special solicitude given over to seaman was also reinforced by this action. Therefore, the guiding principles of maritime law called for the creation of a wrongful death action. In fact, the court in *Miles* reviewed the two driving principles of maritime law to find "there is no recovery for loss of society and a general maritime action for the death of a Jones Act Seaman". *Id.* at 291.

The limitations set upon *Gaudet* and the uniformity of general maritime law created by *Miles* was noted in *Anderson v. Wood Acre Corp.*, 894 F.2d 804 (6th Cir. 1990) (hereinafter referred to as "*Anderson*"). *Anderson* stated that the denial of recovery of non-pecuniary damages met both aims of maritime law. *Id.* at 811. The *Miles* court harmonized the general maritime law and DOSHA and thereby satisfied the uniformity principle while the doctrine of special solicitude was furthered by not allowing recovery for loss of society. *Id.* at 811.

In terms of public policy, if the wrongful death of a recreational boater is given more remedies than that of the seaman, as proposed by the Petitioner, the doctrine of special solicitude will be completely destroyed. In order to

retain the guiding principles of special solicitude and give the Petitioner their requested remedy, Congress would necessarily have to redraft DOSHA and the Jones Act to create recovery for loss of society. Furthermore, there is no split in the decisions from the Circuit Courts. The *Miles* sets precedent and resolves this issue for all the Circuit Courts. Of the two cases that the Petitioner cites as splitting the decisions in the Circuit: *Randall v. Chevron*, 13 F.3d 888 (5th Cir. 1994) was overruled without qualification by *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 at 909 (5th Cir. 1999), and *Blome v. Aero Spatiale Helicopter Corp.*, 924 F.Supp. (805 S.D. TX 1997) held that the Texas wrongful death statute applied. Therefore, both *Blome* and *Randall* are inapposite to the case *sub judice*. The decisions regarding this issue are not split and were resolved by both *Miles* and the *Amtrak* cases.

Petitioners offer a somewhat tortured interpretation of uniformity within their Petition. Petitioners argue that the uniformity of maritime law between the states is of paramount importance. They argue that the uniformity between the statutory maritime law and the non-statutory general maritime law is not important. In effect, the Petitioners want to overrule the *Yamaha* case and not allow states to control wrongful death in their territorial waters. At the same time, Petitioners believe that if the general maritime law and the statutory laws created by Congress diverged there would be less concern.

Respondent submits that the general maritime law should reflect congressional intent as much as possible in order to retain uniformity throughout the nation. Conflict can be resolved on a state by state basis. The *Yamaha* holding demands that each state be given the opportunity to resolve conflicts where their own territorial waters are

concerned. Due to the *Amtrak Sunset Limited* case, Alabama is unique in that its wrongful death statute conflicts directly with general maritime law. Alabama therefore has the option to amend the wrongful death statute so as to comply with general maritime law or resolve itself to the remedies allowed by general maritime law. The general maritime law is uniform. It is consistent with the congressional intent as evidenced by the DOSHA and Jones act. The inconsistency in the case *sub judice* arises from the state's choice not to resolve the conflict with general maritime law.

Petitioners further suggest that general maritime law has recognized the availability of loss of society for wrongful death since *Moragne* in 1970. If general maritime law recognized such a remedy, a case would have arisen in the 33 years since *Moragne*. In fact, such remedy has not been recognized by any court relevant to the case *sub judice*.

CONCLUSION

This issue is not of imperative public importance. The issue has arisen due to Alabama's unique Wrongful Death Statute. The conflict between it and general maritime law effects only Alabama territorial waters. As such the impact of this issue is short-reaching. Further, the issue is moot due to general maritime law. The general maritime law established by the line of cases that start with *Moragne* and goes through *Miles, Yamaha* and *Amtrak* law is clear:

non-pecuniary damages are unavailable to non-dependents of a non-seafarer killed within Alabama territorial waters.

For the foregoing reasons, petition should be denied.

Respectfully submitted,

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